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IN THE
Supreme Court of the United States
October Term, 1998

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, et al.,
Petitioners,

v.

DELORES SCOTT SULLIVAN, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Under Pennsylvania's Workers' Compensation Act, 77 Pa. Stat. Ann. § 531(5) and (6), workers' compensation insurers are permitted to withhold payments to health care providers during a utilization review to determine whether medical treatment was reasonable and necessary. The questions presented are:

I. Whether private companies providing workers' compensation insurance to private employers become "state actors" for purposes of the Due Process Clause when they elect to use a state-authorized utilization review procedure.

II. Whether the Due Process Clause requires workers' compensation insurers to pay disputed medical bills prior to a determination that the medical treatment was reasonable and necessary.

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INTEREST OF AMICUS CURIAE

Washington Legal Foundation (WLF) is a national, nonprofit, public interest and policy center based in Washington, D.C., with supporters nationwide. WLF devotes substantial resources to litigating cases and publishing educational materials that promote limited and accountable government, the proper role of the judiciary, reasonable government regulation, and due process protection for businesses. WLF has regularly appeared before this Court as amicus curiae advocating these principles. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Steel Company v. Citizens for a Better Environment*, 118 S.Ct. 1003 (1998); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Eastern Enterprises v. Apfel*, 118 S.Ct. 2131 (1998). WLF is concerned that if the lower court judgment in the instant case is upheld, the imposition of "state actor" status on otherwise private regulated businesses for purposes of the Due Process Clause could have a far-reaching impact on other heavily regulated industries such as health care providers, banks, telecommunication carriers, and the like. Our brief thus focuses on Issue One of the questions presented.[1]

SUMMARY OF ARGUMENT

In his classic work THE SOPHIST — Plato analyzes the theoretical conditions that ensure the validity of judicial decisionmaking. THE SOPHIST (Plato) (J. Turrell tr., 1961). In particular, Plato explores the conceptual errors at work

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than amicus and its counsel, contributed monetarily to the preparation and submission of this brief. Written general consents to the filing of this and other amicus briefs in this proceeding have been lodged with the Clerk.

whenever the task of delineating a legal concept goes awry. Because the process requires the ability to "distinguish according to real distinctions," mistakes most commonly result from "faulty generalizations" and the failure to discern the "essential affinities" between related rules of law. A lapse in the rigor of the analysis — which makes the result resemble the work of "an inefficient butcher" — will be ruinous to the public weal. To avoid that outcome, careful attention to the "natural joints" of the matter — its genuine logical and definitional contours — is crucial. *Id.* at 97-99.

Courts required to decide when private action becomes state action for the purposes of the Fourteenth Amendment Due Process Clause, face precisely this definitional task. Applying relevant precedents, "distinguish[ing] [other cases] according to real distinctions," and parsing only at the "natural joints" of the juridical concept being assessed, are particularly vital steps in the state action arena. This is so, not least of all, because of the reflexive tendency by some courts to reason that a complainant's "expectation of procedural due process" is tantamount to a guarantee of such protection whenever any state involvement is present, no matter how attenuated it may be.

In the instant case, the Third Circuit's assessment of this Court's relevant precedents missed the mark in dramatic ways. Indeed, with due respect, the lower court's resolution of the issue of Petitioners' status as state actors *vel non*, cannot escape comparison to Plato's "inefficient butcher." The court's decision carves not at the "natural joints" of the state action doctrine, but according to artificial or illusory distinctions. Stark proof of this is the court's theory that Petitioners are state actors because Pennsylvania's regulation of the state workers' compensation system constitutes a "complex and interwoven

regulatory web." Pet. App. at 14a. This factual characterization becomes the vital predicate of the lower court's belief that relevant state action decisions of this Court are wholly inapposite. Bereft of the moorings those cases provide, the Third Circuit's holding becomes incoherent.

Instead, Petitioners do not qualify as state actors, and this case can be decided by resort to those precedents where the Court has determined that no constitutionally-cognizable state action exists, notwithstanding the presence of the state regulatory regime in question. Accordingly, the Third Circuit's conclusion to the contrary must be reversed.

ARGUMENT

I. ANALYTICAL PARAMETERS OF THE STATE ACTION DOCTRINE

The Third Circuit's ruling that workers' compensation insurers become "state actors" for due process purposes when they rely on Pennsylvania's benefits review procedure, is erroneous. The court's error results from a failure to discern the logical contours or "natural joints" of the state action doctrine. This basic confusion produced a distorted analytical framework for assessing the significance, for due process purposes, of Petitioners' use of the review procedure. With that initial misstep, the lower court's analysis was irrevocably skewed (*see* Section II, *infra*.)

It did not have to be that way. As we discuss below, a valid construct for the state action doctrine emerges straightforwardly from its textual and logical underpinnings. Focusing on these foundation points helps ensure that the

analysis begins from a valid orientation and that it develops coherently. *See, e.g.*, C. Black, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969) (Arguments from structure and relationship support constitutional conclusions on the basis of their fit with, or their entailment by, the necessary presuppositions of the governmental structure the Constitution creates).[2] This Court's cases generally are in harmony with this approach, notwithstanding that the decisions have sometimes produced theories of state action with varied emphases. After showing that the Third Circuit's *ratio* is an aberration, we suggest in Section III certain refinements to state action doctrine that may aid lower courts in their analyses.

***

1. *Structural Considerations*. The federal Constitution's core function is to provide a framework for national republican self-governance. The Constitution "concerns itself almost exclusively with the creation of federal governmental bodies, the allocation of governmental power among those federal bodies and the states, and the limitation of that governmental power at both the state and federal levels." H. Strickland, *The State Action Doctrine and the Rehnquist Court*, 18 Hastings Const. L.Q. 587, 591 (1991).

With rare exception, the Constitution does not govern or

[2] Perhaps the most famous example of structural argument comes from Chief Justice Marshall's opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), forbidding state taxation of federal entities on the ground that the power to tax is the power to destroy. *Id.* at 427. With the state and national governments structured as they were under the Constitution, it would make no sense, Marshall reasoned, for the state to be able to frustrate constitutionally legitimate federal policies.

regulate the affairs of individuals and private entities, such as Petitioners. Rather, "it establishes the structure through which, and the limits within which, governmental bodies regulate the daily activities of individuals and define their rights and responsibilities *vis-a-vis* their neighbors." *Ibid.* These rights among private citizens owe their existence to legislation and state common law, not to the Constitution.

Consistent with these purposes, the individual rights and liberties guaranteed by the Constitution are, for the most part, freedoms from certain kinds of *governmental action*.[3] Indeed, of the constitutional rights that are self-executing — those capable of enforcement by courts even without specific congressional legislation to enforce the right — only the Thirteenth Amendment's prohibition of slavery directly restricts the actions of private citizens. Accordingly, "as a matter of substantive constitutional law, the state action requirement reflects judicial recognition that 'most rights secured by the Constitution are protected only against infringement *by governments*.'" *Flagg Bros. v. Brooks*, 436 U.S. 149, 156 (1978) (interior citation omitted).

This "fundamental fact of our political order," *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982), cannot be overestimated. In virtually any litigation in which an individual contends that his constitutional rights have been violated, the court can grant relief *only* if it finds action by or attributable to

[3] The first eight Amendments apply, expressly or impliedly, only to actions of the federal government. Similarly, the Fourteenth Amendment Due Process and Equal Protection Clauses expressly apply only to state governments. With the exception of the Thirteenth Amendment, constitutional liberties apply to only governmental actions.

the state. *Rendell-Baker v. Kohn*, 457 U.S. 830, 836 (1982) ("The Court has insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State"). In other words, "[i]f the conduct is not that of the state, then it *cannot be unconstitutional*, because the Constitution applies only to state action." Strickland, *supra,* at 617 (emphasis added). This limiting facet of the state action doctrine — one of its important "natural joints" — has crucial pragmatic consequences. If state action and private action cannot, by definition, coalesce — then, *a fortiori*, the range of state action cases is determinate, even in the modern regulatory state.

2. Constitutional Values Underlying the State Action Doctrine. Within this structural context, at least two further constitutional values operate. First, the "state action" requirement "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar*, 457 U.S. at 936.[4] Accordingly, valid state action analyses explicitly recognize that this protected value is, by the very nature of the issue, always extant in such cases. As the Court put the point in *Lugar*, "Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference." 457 U.S. at 936-937. Thus, private parties can be held liable for alleged due process violations only if "it can fairly be said that

[4] Correlatively, the state action doctrine "avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Lugar*, 457 U.S. at 937.

the [government] is responsible for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

Relatedly, there is also inherent in the concept of state action the values of federalism and separation of powers — a recognition that there are areas of private rights as to which federal power "should not lay a heavy hand and which should properly be left to the more precise instruments of local authority." *Peterson v. City of Greenville,* 373 U.S. 244, 250 (1963) (Harlan, J. concurring). Consequently, courts are required "to respect the limits of their own power as directed against . . . private interests." *Lugar*, 457 U.S. at 937. *See also, Hammer v. Dagenhart*, 247 U.S. 251 (1918) (The Court has "no more important function than . . . the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, [both] federal and state . . .").

3. These considerations illumine the "natural joints" of the state action doctrine in several ways, critical for courts to keep in focus as they adjudicate state action cases. *First*, the state action doctrine makes *these particular* values (individual liberty and federalism) *logically prior* to others that a plaintiff may wish to invoke. This means the approach in state action analyses must be distinguished from "balancing" formulas in related contexts. For example, a plaintiff's expectation of procedural due process is, in many contexts, a constitutional value that is weighed in the balance against other values, such as the interests of the state. This, of course, is the conceptual presupposition that underlies constitutional "balancing" tests of the kind articulated by the Court in such cases as *Matthews v. Eldridge*, 424 U.S. 319 (1976). In these cases, the plaintiff's expectation of the availability of due process relief is, by the

nature of the case, a fully instantiated constitutional interest. Whether the plaintiff is entitled to the due process procedures he seeks is thus a matter of comparing the "weight" of his interest to the conflicting or incompatible (but equally instantiated) interests of the state. The judicial test by which that comparison proceeds does *not* presuppose that the interests of one side or the other are *logically prior*. (If it did, the "balancing" would be an illusion.) Therefore, the plaintiff's *expectation* of due process is, in that setting, analytically equivalent to his *interest* in due process.

But that is not how the state action doctrine operates. Here, the extent of a plaintiff's constitutional interest in due process is *not* a factor, in the first instance, in a court's inquiry as to whether state action is present — and thus whether a constitutional case or controversy exists at all. Unless courts begin with the key premise that the purpose of the requirement is to ensure against subjecting a private entity's actions to constitutional scrutiny in the absence of state action, there is the risk that a plaintiff's desire for due process will be seen as a competing value in a court's threshold appraisal of the defendant's status as state actor *vel non*. *See, e.g., Lugar*, 457 U.S. at 937 ("This liberty would be overridden in the name of equality, if the structures of the amendment were applied to governmental and private action without distinction"). This is a particularly vexing risk in a case such as the instant one, where a consumer's expectation of due process may be a widespread perception throughout society. But vexing or not, the values that underlay the state action doctrine fix its contours, and can be ignored only at the risk of incoherence. *See, e.g., Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 299 (1978) (plurality opinion of Powell, J.) (Courts must discern "principles sufficiently absolute to give them roots throughout

the community and continuity over significant periods of time, and to lift them above the level of pragmatic political judgments of a particular place and time").

Second, if a court intuitively proceeds as if a plaintiff's claim of due process is an already-concrete interest to be "weighed in the balance," there is a danger that the court might view its resolution of the issue as dependent on the "unique facts and circumstances" of the case, rather than be guided by a general rule of law. This opens the door for a court to act with undisciplined discretion; to react viscerally or intuitively to a case that may, in fact, have "equities" favoring the plaintiff, but is devoid of genuine state action. *See, e.g.*, A. Scalia, *The Rule of Law As a Law of Rules*, U. Chic. L. Rev. 1175 (1989) ("[W]hen balancing is the mode of the analysis, not much general guidance may be drawn from the opinion, *id.* at 1186. *** In the real world of appellate judging, it displays more judicial restraint to adopt a general principle than to announce that, 'on balance,' we think the law is violated here — leaving ourselves free to say in the next case that, 'on balance,' it was not. Only by announcing rules to we hedge ourselves in." *Id.* at 1179).

2. Although these conceptual pitfalls should be obvious, errors among the lower courts may be exacerbated by the Court's occasional statements in state action decisions, that lower courts proceed on a case by case basis, "sifting facts and weighing the circumstances" for signs of the "nonobvious involvement of the State in private conduct." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). If lower courts interpret this as meaning that they have substantial discretion to employ a variety of "tests" for assessing state action claims, depending on how they view the weights of

opposing values and interests, substantially divergent opinions inevitably result. *See, e.g., Camp Newfound/Owatonna, Inc. v. Town of Harrison*, 117 S.Ct. 1590, 1620 (1997) (critical that "open-ended balancing tests . . . have allowed us to reach different results," but "not on any distinction derived from the test of the Constitution itself").

A prominent example of a Supreme Court decision that is susceptible to such misapplication is Justice Clark's opinion in *Burton, supra*. The Court there considered whether a private restaurant that rented space from a city-owned building was subject to the race-discrimination proscriptions of the Fourteenth Amendment. The case turned on whether the contacts between the city authorities and the restaurant were sufficient to constitute state action.

What is remarkable about this opinion is the absence of criteria that would resolve doubts about the application of "state action" — the key legal concept at issue. On one hand, Justice Clark acknowledged that, "[o]wing to the very 'largeness' of government, a multitude of relationships might appear to some to fall within the Amendment's embrace." *Id.* at 722. He then tries to forfend that conclusion, by elaborating, "[B]ut that . . . can be determined only in the framework of the peculiar facts or circumstances present. Therefore, respondents' prophecy of nigh universal application of a constitutional precept so peculiarly dependent for its invocation upon appropriate facts fails to take into account 'differences in circumstances [that] beget appropriate differences in law.'" *Ibid.*[5] That qualification, however, does not express a

[5] Justice Clark concluded: "Specifically defining the limits of our inquiry, what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself." *Id.* at 725-26 (citations omitted).

meaningful principle or general rule of interpretation. It is as if the majority did not have any rule at all in mind — no genuine confidence in just where the "natural joints" of the state action doctrine fell — and invoked "appropriate differences in law" as a place-holder for an intelligible precept. As both Justice Harlan in dissent and commentators immediately noticed, the opinion lacks sufficient clarity as to what kinds of contacts between the state and private enterprises would come within the scope of the state action requirement as conceived by the *Burton* majority. Thus, a lower court's reliance on *Burton*'s rationale can create confusion, if the court does not have clearly in focus at the start the values the state action requirement serves. As shown below, the Court's recent precedents plainly reflect these important considerations.

II. THE COURT'S RECENT PRECEDENTS REFLECT THE VALUES UNDERLYING THE STATE ACTION DOCTRINE.

1. The Court's recent state action cases model the interplay of these analytical parameters in various fact patterns involving state regulatory structures. Several decisions during the last twenty years clearly hold that the actions of a private entity are not state action subject to the Fourteenth Amendment just because the entity is subject to general state regulation, even if the regulations are pervasive. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), one of the most often cited

decisions articulating this rule, applied the rule to an electric utility's actions. The plaintiff in *Jackson* alleged that the defendant electric utility violated the Due Process Clause by disconnecting her electric service for nonpayment of her bill without providing a hearing. Conceding that the state subjected the utility to "extensive and detailed" regulation, the Court held that "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." *Id.* at 350.

Although the actions of heavily regulated industries perhaps will be more readily deemed state action, the Court continued, the presence of the general regulatory scheme as such does not produce that result. Rather, there must be "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." *Id.* at 351. In the context of treating regulated private entities as state actors, this nexus requirement means that the regulations must in some way *involve the state directly* in the challenged activity.

Rendell-Baker v. Kohn, 457 U.S. 830 (1982), is a further application of this rule. The defendants in that case were a private school and its officials. The school specialized in helping students with difficulties completing public high school. State agencies referred most of the students to the school, and state funds accounted for most of the school's budget. In addition, a variety of government agencies extensively regulated a wide range of the school's activities. Nonetheless, the Court held that the school's discharge of the plaintiff, a counselor at the school, was not state action because the state's framework did not regulate such personnel matters

as the discharge of counselors.[6]

This orientation is in full harmony with the constitutional values discussed in Section I. *Jackson* and *Rendell-Baker* thus illustrate holdings where the Court has parsed the state action doctrine at its "natural joints." The Court deems private conduct to be state action on the basis of state regulation only if the regulations involve the state in or directly impact the challenged activity itself. For example, in *Peterson v. Greenville*, 373 U.S. 244 (1963), the Court held that the state *was responsible* for a restaurant owner's decision not to serve blacks, because a city ordinance required racial segregation in public eating places. Because the restaurant's management "did precisely what the city law required," *id.* at 250, the initiative for the discrimination came from the state. The Court concluded that such state imposed segregation clearly violated the Equal Protection Clause.

No recent decisions of this Court have held private conduct to be state action on the basis of state regulation. Of course, state regulation of private activities apparently may still result in private conduct's being deemed state action. This theoretical prospect is consistent with the conceptual

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[6] In *Rendell-Baker*, the private school received "problem" students referred to it by public institutions, it was heavily regulated, and it received between 90 and 99 percent of its operating budget from public funds. In *Blum*, the nursing home had most of its operating and capital costs subsidized by public funds and more than 90 percent of its residents had their medical expenses paid from public funds. In setting reimbursement rates, the state included a formula to assure the home a profit. Nevertheless, in both cases, the Court found that the entities remained private and required plaintiffs to show that the state was involved, either through coercion or encouragement.

underpinnings of the state action requirement. The Court has never overruled *Peterson* and continues to cite it with approval. *See, e.g., Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (regulation requiring private clubs to adhere to by-laws held to violate Equal Protection Clause because by-laws called for racial discrimination in guest policies) The Court's opinions, however, concentrate on *defining the limits* of the state action in the regulatory context. Thus, in *Blum v. Yaretsky*, 457 U.S. 991 (1982), the Court stated that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.* at 1004. *See also, Rendell-Baker*, 457 U.S. at 840-841; *Jackson*, 419 U.S. at 357. These opinions indicate that the Court will treat private conduct as state action if the state compels the conduct or significantly encourages the conduct in some way.

Indeed, the *Blum* decision raises doubt that any regulation short of a specific directive to perform the challenged action or to make the challenged decision will suffice to treat the activity as state action. The plaintiffs in *Blum* were Medicaid patients who were involuntarily discharged from nursing homes or transferred from one level of nursing home care to another. They alleged that the decisions of their nursing homes to discharge or transfer them violated the Due Process Clause because they were not provided notice or an opportunity for a hearing. The nursing homes made the transfer decisions only because New York and federal Medicaid regulations require periodic assessment of whether Medicaid recipients are receiving the appropriate level of care. The regulations required the nursing homes to "'maintain a discharge planning program to . . . document that the facility has made and is continuing to

make all efforts possible to transfer patients to the appropriate level of care or home as indicated by the patient's medical condition or needs." *Id.* at 993. Moreover, the nursing homes were subject to sanctions if they failed to assign Medicaid patients to the level of care the State deems appropriate. The purpose of the procedures, including the multiple levels of nursing home care, the need assessments, and the transfer decisions, was to control and reduce the cost of the Medicaid program to the state. The nursing homes would not make the assessments or initiate the transfers but for the state regulations requiring them to do so, in order to serve the state objective of controlling Medicaid costs.

Nevertheless, the Court held that the nursing homes' decisions to transfer the plaintiffs to another level of care was not state action because the "decisions ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." *Id.* at 1008. Thus, "while the State commands the making of some decision," sets criteria for the decision, and imposes sanctions for making the decision incorrectly, "it still is not responsible for the specific decision made, which inevitably turns on an independent medical judgement." *Ibid.*

The state's regulatory role in *Blum* was insufficient to make the nursing homes' transfer decisions state action. This suggests that the logical contours of the state action doctrine require "state regulatory involvement or encouragement in the nature of a specific directive to make a specific decision or perform a specific act."[7] Strickland, *supra*, at 622.

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[7] *See also, Flagg Bros. v. Brooks*, 436 U.S. 149 (1978). In that case, a warehouseman proceeded under the New York Uniform

Whatever level of state regulatory involvement is required to deem the action of a regulated entity state action, state action exists only because of the state regulatory involvement. Unless the private conduct is an exclusive function of the sovereign the private entity is free to engage in the challenged conduct on its own initiative. In effect, therefore, the state regulation — not the private conduct pursuant to the regulation — is the state action. In short, private activities or decisions are state action under the Fourteenth Amendment when state regulations specifically compel the challenged action or decision.

2. *The Third Circuit's Rationale Conflicts With These Principles*. In the instant case, the Third Circuit purported to "place the insurer's role within the Workers' Compensation system in context." Pet. App. at 13a. The court identified what it took to be the "key features" of the system: that no-fault compensation applies to all employees within the state; that employees lose the right to sue their employers in tort, so that the workers' compensation scheme is the exclusive remedy for injured workers; that the system is mandatory; and that the state guarantees that benefits will be paid. These features, said the court, show that the state extensively regulates and controls the

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Commercial Code, and the debtor challenged the constitutionality of that provision on the grounds that it violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Plainly the state was responsible for the statute. The response of the Court, however, focused not on the terms of the statute but on the character of the defendant to the § 1983 suit: Action by a private party pursuant to this statute, without something more, was not sufficient to justify a characterization of that party as a "state actor."

workers compensation system, and that it thus constitutes a "complex and interwoven regulatory web." *Id.* at 14a.

Although insurance companies are private entities, "when they act under the construct of the Workers Compensation system, they are providing public benefits which honor State entitlements. In effect, they become an arm of the State, fuifilling a uniquely governmental obligation under an entirely state-created public benefit system." *Id.* at 15a. Thus, insurance companies are "a partner or arm of the State in implementing legislation that administers const protected entitle which the Commonwealth has enacted as a matter of policy." *Ibid.* The right to stop payments is a power that traditionally was held in the hands of the State. Insurers have no power to deprive or terminate such benefits without the permission and participation of the state. Finally, the state is intimately involved in the suspension decision because "an insurer cannot suspend medical payments without first obtaining authorization from the Bureau." *Ibid.*

The Third Circuit noted the state action cases discussed above, but deemed them inapposite. It did so on the ground that those decisions, "do not, by the very nature of the controversies with which they dealt, involve a comprehensive statutory scheme similar to that present in this case." Id. at 18a.

The Third Circuit's decision illustrates the effect of a court's neglecting to parse the state action requirement at its "natural joints." Here, the lower court did little more than list perceived ties between the government and the Petitioners' challenged conduct, and then announce the conduct to be state action. That approach carries no more substance than saying that the private entity's conduct is state action because it ought

to be deemed state action — merely an opaque tautology. Not surprisingly, therefore, the internal logic of the lower court's opinion collapses. Conceptually, it is impossible to discern in a principled fashion any difference between the suspension of insurance payments under the Pennsylvania statute, and the termination of electric service in *Jackson* or termination of care through patient discharges or transfers in *Blum*. The Pennsylvania statute merely permits private parties to withhold payments to health care providers during the benefits review. That process is conducted not by state officials but by medical professionals employed by private organizations. The decision to withhold payment of disputed medical bills is made entirely by Petitioners, with no coercion or encouragement by the state. In this sense, it cannot be distinguished from the decision of any party to withhold contract payments until a dispute is resolved.

Not surprisingly, the Third Circuit intones language eerily reminiscent of Justice Clark's opinion in *Burton*. While failing to articulate a legal principle that would lead to a valid conclusion, the court nonetheless "expressly limit[s] our holding . . . to the unique context" of the case. The court's decision thus lacks sufficient coherence to permit review using the conceptual framework that has evolved as this Court's state action doctrine. The Third Circuit's decision is, for that reason, genuinely arbitrary.

III. THE COURT SHOULD REITERATE THE VALUES THE STATE ACTION DOCTRINE SERVES, AND IN THE CONTEXT OF STATE REGULATORY REGIMES REQUIRE DIRECT INFLUENCE OR COERCION BY THE STATE.

In the instant case, Petitioners did no more than invoke a presumptively valid state procedure specifically designed as a legislative approach to cost containment. Apparently relying on a sort of "but for" analysis, the Third Circuit erroneously concluded that the procedural steps provided for by the Pennsylvania statute somehow transform Petitioners' acts into actions of the state. Invoking that procedure might be said, in the most strained sense, to implicate the state or its officers — but only by emptying "nexus" of any useful meaning. Transforming essentially private conduct into actions of the state by that means is adjudication by fiat.

To avoid this confusion, the Court should stress the importance of a lower court's articulating precisely what relationship between the state and the private entity is required for this conclusion and why that relationship justifies application of the Fourteenth Amendment to a private entity. The Court should also caution that "sifting facts and weighing the circumstances" in state action cases must be done with the values underpinning the state action doctrine firmly fixed in the analysis. The general rule that emerges from the Court's cases in the arena of state regulation — which calls for a showing that the state has involved itself in a direct, coercive way — will enable lower courts to parse state action according to their "natural joints." A state action formula that fails to begin with

that orientation neither guides courts in applying the Fourteenth Amendment to governments' efforts to act with or through private entities, nor prevents courts from intruding upon the political branches' exclusive authority to regulate private activity.

CONCLUSION

The judment of the Third Circuit should be reversed.

Respectfully submitted,

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